(2)

No. 09-670

In The
Supreme Court of the United States

LOCAL #46 METALLIC LATHERS UNION AND REINFORCING IRON WORKERS AND ITS ASSOCIATED BENEFIT AND OTHER FUNDS,
Petitioner,

v.

UNITED STATES OF AMERICA, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, following the denial of a petition for mandamus under the Crime Victims' Rights Act of 2004 ("CVRA"), 18 U.S.C. § 3771(d)(3), an alleged victim has standing to file a petition for a writ of certiorari, given that the CVRA provides victims only a limited appellate right to mandamus review before a circuit court of appeals, with very short filing and disposition time frames, and a crime victim is not an actual "party" to the underlying criminal case?

2. Whether the court of appeals properly determined that multiemployer trust funds were not victims entitled to restitution under the Mandatory Victims Restitution Act of 1996 ("MVRA"), 18 U.S.C. § 3663A(a)(2), where the trust funds were not directly and proximately harmed by the criminal defendant's conduct in furtherance of the lone offense of conviction - a conspiracy to commit money laundering through a fraudulent check cashing scheme that was completed when the check casher delivered the cash to the defendant - but instead, were harmed, if at all, by the defendant's separate use of the cash to pay employees off the books and his corresponding, uncharged, fraudulent failure to have the employer report the hours worked to the funds or make payments to the funds for those hours, as required by certain collective bargaining agreements?

PARTIES TO THE CASE

The parties to this criminal case are Respondents the United States of America and Charles Doherty ("Doherty").

In the criminal proceeding below, Petitioner Local #46 Metallic Lathers Union and Reinforcing Iron Workers and its associated benefit and other funds (the "Funds") sought an award of restitution. Doherty disputes the Funds' status as parties to this case.

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The Court of Appeals for the Second Circuit entered its opinion on June 9, 2009. The court's decision is reported at *In re Local #46 Metallic Lathers Union and Reinforcing Iron Workers, et al.*, 568 F.3d 81 (2d Cir. 2009). The district court's opinion, adopting the report and recommendation of the magistrate judge, is unreported, but can be found at *United States v. Doherty*, 2009 WL 1310877 (E.D.N.Y. May 7, 2009).

JURISDICTION

This Court lacks jurisdiction over the petition for a writ of certiorari because the Funds lack standing to seek such review. The Funds filed a petition for mandamus with the Court of Appeals for the Second Circuit on May 19, 2009. On May 22, 2009, the Court of Appeals issued an order denying the petition, noting that an opinion would follow. The Court of Appeals entered its opinion on June 9, 2009. As discussed below, because the Government opted not to seek a writ of certiorari, the Court of Appeals' decision is the final level of review available to the Funds. Therefore, this Court does not have jurisdiction to consider the Funds' petition for a writ of certiorari.

INTRODUCTION

The Funds' petition for a writ of certiorari should be denied. The Funds lack standing to seek review by this Court and there is no real conflict among the circuit courts that warrants review.

First, the CVRA provides an appellate mandamus remedy with the circuit court of appeals for alleged victims unhappy with a district court's ruling; however, the mandamus remedy comes with very short filing and disposition deadlines; and the CVRA conspicuously fails to provide alleged victims with a right to any further relief. To the contrary, the CVRA gives the Government alone the right, in its discretion, to appeal an adverse decision regarding an alleged victim. Therefore, because the Government opted not to seek review in this Court, the Funds' appellate review rights ended with the Court of Appeals' denial of their petition for mandamus.

Second, there is no split among the circuit courts that warrants review by this Court, especially given the facts of this case. The Funds argue that there is a split among the circuit courts regarding whether persons who were not named in an indictment or plea agreement, but were harmed by closely related criminal conduct of the defendant, can be treated as victims under the MVRA, 18 U. S.C. § 3663A(a)(2). The Funds are mistaken in two respects.

Preliminarily, the Funds wrongly assume a close "relatedness" between defendant Doherty's lone crime of conviction - conspiracy to commit money laundering - and the loss of contributions the Funds allegedly suffered. In fact, the lower courts in this case conclusively ruled that Doherty's conspiracy to commit money laundering was completed when Doherty received cash for fraudulent checks from a check casher, and (2) Doherty's subsequent use of the cash to pay employees off the books and then have United States Rebar, Inc. ("U.S. Rebar") defraud the Funds out of contributions for the hours those employees

worked by not reporting the hours worked or paying the contributions due for those hours, were separate and distinct crimes, that involved materially different acts and elements, for which Doherty was neither charged nor convicted. Consequently, the Funds' premise their petition on facts that are contrary to those established by the courts below.

Further, none of the decisions the Funds cite actually extended victim status to persons, like the Funds, who were harmed by criminal conduct that was separate and distinct from the offense of conviction. Although some circuit courts have extended victim status to individuals directly and proximately harmed by the conspiracy or scheme of conviction, even if they were not expressly named in the indictment or plea agreement, those courts agree that victim status does not extend to one harmed by uncharged criminal conduct that was separate and distinct from the conspiracy or scheme of conviction.

Accordingly, the Court of Appeals correctly denied the Funds' petition for mandamus under settled law and there is no reason to grant further review.

STATEMENT OF THE CASE

The Government charged Doherty with engaging in a conspiracy to launder money that involved three unlawful activities - uttering forged checks, theft concerning programs receiving federal funds, and mail fraud. In 2005, Doherty pleaded guilty to a single count of conspiracy to commit money laundering in violation of 18 U.S.C. § 1956(h). At the plea hearing, Doherty admitted that he forged checks from U.S. Rebar payable to fictitious vendors, which he then

provided to Joseph Castello, a check casher, who cashed the checks and then delivered the cash, minus a fee, to Doherty. Doherty also admitted that he used the cash he received from Castello to pay U.S. Rebar's employees off the books, and that he subsequently failed to have U.S. Rebar (1) report the hours worked to the Funds, or (2) contribute to the funds for the unreported hours. 568 F.3d at 82.

Before pleading guilty, Doherty signed a Cooperation Agreement with the Government. The Cooperation Agreement stated, in part, that "no criminal charges will be brought against the defendant for his heretofore disclosed participation in criminal activity involving his fraud in connection with federal disadvantaged business enterprise programs, *defrauding union benefit funds*, and all related money laundering." 2009 WL 1310877, *6.

During the sentencing phase, the Funds moved for an award of restitution as alleged crime victims under the CVRA and the MVRA. After extended proceedings, including multiple rounds of briefing and argument, the Magistrate Judge concluded that the Funds were not "victims" as defined under the MVRA.[1]

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[1] The MVRA, 18 U.S.C. § 3663A(a)(2), defines the term "victim" as follows:

> For purposes of this section, the term "victim" means a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered, including, in the case of an offense that involves as an element a scheme, conspiracy, or pattern of criminal activity, any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern.

The Magistrate Judge reasoned in pertinent part as follows:

> *The court agrees with Doherty that the crime of which he was convicted - conspiracy to launder money - was "completed" when he received the cash from Castello* .... Doherty might have done anything or nothing with the cash after he revived it, but the crime of conspiracy to launder money, which here included the crime of laundering money, had already been committed by the time the cash was given to the union workers. *It was the common goal of the conspirators [Doherty and Castello] to turn false checks into cash and there is no basis for finding that the use of that cash to pay union workers was part of that conspiracy. Instead, that use was, as Doherty urges, a separate scheme.*
>
> .... As Doherty himself has recognized, the MVRA "does allow for recovery for uncharged or acquitted conduct that is part of the scheme, conspiracy or pattern of criminal conduct that was an element of the offense of conviction," but "it does not allow for recovery for acts committed in furtherance of a broader uncharged scheme being carried on by one of the co-conspirators. [Citation omitted.] *The payment in cash to union workers and the concomitant failure to pay benefit contributions is just such a "broader uncharged scheme carried on by one of the con-conspirators" - Doherty. Although the Funds were directly harmed by that broader scheme, they were not harmed by the conspiracy of which Doherty was*

> *convicted and are not victims of the offense of conviction.* (Emphasis added.)

2009 WL 1310877, *7.

The District Court adopted the Magistrate Judge's report and recommendation. In so doing, the District Court similarly rejected the Funds' argument that they were directly and proximately harmed by the offense of conviction:

> Magistrate Judge Wall found, and the parties do not dispute, that the specific unlawful activity which Doherty engaged in was the uttering of false checks. However, the parties diverge on what "financial transaction" Doherty conducted with the proceeds of the unlawful activity. *Magistrate Judge Wall found that the financial transaction was complete when Doherty converted the checks to cash, which Doherty received directly from Castello [the check casher]. The Court agrees.* At that point, Doherty conducted a financial transaction by converting checks into cash, and that financial transaction involved the proceeds of an unlawful activity, *i.e.*, forged checks.
>
> The Court rejects the Funds' argument that the financial transaction involved in the money laundering conspiracy was Doherty's payments of cash to his workers with the proceeds of the forged checks. *It is true that Doherty may have engaged in a broader scheme involving the payment of cash to his employees in order to avoid certain responsibilities; however, that is*

> *not the specific count for which Doherty pled guilty ....*
>
> *Because the underlying crime was completed upon the receipt of cash from the fraudulent checks, the Funds cannot be a victim under the MVRA .... Thus, the court finds that the Funds did not suffer direct and proximate harm from the crime for which Doherty entered a plea of guilty, and therefore declines to award the Fund restitution.* (Emphasis added.)

2009 WL 1310877, *2 - *3.

The Funds next sought mandamus relief from the Court of Appeals for the Second Circuit pursuant to the CVRA, 18 U.S.C. § 3771(d)(3). Within the time limit set forth in that Section, the Court of Appeals denied the Funds' petition, and subsequently issued a thirteen page written opinion on June 9, 2009, which held that the district court did not err or abuse its discretion. Like the lower courts, the Court of Appeals determined that the Funds were not directly or proximately harmed by the conspiracy of conviction, but instead, were harmed, if at all, by a conspiracy that was separate and distinct from the conspiracy of conviction:

> *The district court adopted the magistrate judge's report and recommendation in its entirety, finding that Local 46 had not been directly and proximately harmed by Doherty's money laundering because the offense was compete at the moment Castello handed the cash to Doherty.* The court agreed that restitution was not available under the MVRA for harm

caused by the actions of a single conspirator acting outside the conspiracy as part of a broader uncharged scheme ....

....

Local 46 argues that the money laundering conspiracy to which Doherty pleaded guilty included Doherty's cash payments to union workers. *The dispositive issue is therefore whether the conspiracy to launder money for which Doherty was convicted was complete when Castello [the check casher in the money laundering conspiracy] transferred the cash to Doherty or whether it included making the cash payments to [U.S. Rebar's] employees with the monies received in the laundering process.* It is those cash payments, Local 46 alleges, that deprived it of benefits due under collective bargaining agreements. *For the reasons that follow, we hold that the district court did not abuse its discretion in determining that the conspiracy charge to which Doherty pleaded guilty did not encompass the activity of which Local 46 was a victim.*

....

Given the elements of the crime to which Doherty pleaded guilty, if we were to adopt the position that Local 46 advocates, we would have to engage in an expansive redefining of the term "victim." .... While the language expands what it is that will give rise to compensable loss when a scheme, conspiracy or pattern is involved, the reference point to which such a conspiracy is

> tied remains the "offense" of which the defendant has been convicted ....
>
> *Notwithstanding what Doherty planned to do with the laundered funds once he had them in his possession, the "offense" to which he pleaded guilty was solely and exclusively the conspiracy to engage in money laundering. The cooperation agreement (a) required Doherty to plead guilty to a money laundering conspiracy, and (b) barred the Government from prosecuting Doherty for activities relating to "defrauding union benefit funds." It is therefore clear that the offense of conviction was not conspiracy to defraud the union.*

568 F.3d at 84 - 87.

REASONS FOR DENYING THE WRIT

I. THE FUNDS LACK STANDING TO FILE A PETITION FOR A WRIT OF CERTIORARI.

The Petition should be denied because the Funds lack standing to ask this Court to hear the case. The CVRA expressly grants alleged victims one appellate right - an opportunity to file a petition for a writ of mandamus with the court of appeals. Congress' omission of any other rights of review for alleged victims, coupled with (1) the extremely short time frames imposed on the mandamus review, and (2) the fact that Congress gave the Government the right (but not the obligation) to seek further review on behalf of an alleged victim, demonstrates that Congress intended to limit an alleged victim's appellate rights to

filing a petition for mandamus with the court of appeals.

A. The plain language of the CVRA demonstrates that Congress did not intend for alleged crime victims to be able to seek appellate review beyond the filing of a petition for mandamus.

The CVRA narrowly prescribes a victim's appellate rights and necessarily excludes seeking review in this Court. Section 3771(d), titled "Enforcement and *Limitations*," (emphasis added), states in this regard as follows:

> (3) **Motion for relief and writ of mandamus.** - The rights described in subsection (a) shall be asserted in the district court in which a defendant is being prosecuted for the crime or, if no prosecution is underway, in the district court in the district in which the crime occurred. The district court shall take up and decide any motion asserting a victim's right forthwith. *If the district court denies the relief sought, the movant may petition the court of appeals for a writ of mandamus. The court of appeals may issue the writ on the order of a single judge pursuant to circuit rule or the Federal Rules of Appellate Procedure. The court of appeals shall take up and decide such application forthwith within 72 hours after the petition has been filed. In no event shall proceedings be stayed or subject to a continuance of more than five days for purposes of enforcing this chapter.* If the court of appeals denies the

> relief sought, the reasons for the denial shall be clearly stated on the record in a written opinion.
>
> (4) **Error.** - In any appeal in a criminal case, *the Government may assert as error the district court's denial of any crime victim's right in the proceeding to which the appeal relates.* (Emphasis added.)

18 U.S.C. § 3771(d). Thus, Congress crafted a narrow mandamus remedy for alleged victims under CVRA, but stopped short of giving them full appellate rights. Instead, Congress gave the Government the right, but not the obligation, to pursue matters on behalf of an alleged victim under normal appeal channels, which include filing a petition for a writ of certiorari.

The Funds acknowledge that the CVRA does not expressly grant alleged victims the right to seek review of a denial of a petition for a writ of mandamus (Petition at 8), but proceed to argue, based on certain legislative history, that Congress nevertheless intended for victims to have such a right when it enacted the CVRA. The Funds' reliance on legislative history and policy arguments is misguided and violates fundamental principles of statutory interpretation.

It is well-settled that "when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies. 'When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode.'" *National R. R. Passenger Corp. v. Nat'l Ass'n of R. R. Passengers,* 414 U.S. 453, 458 (1974) *quoting Botany Worsted Mills v. United States,* 278 U.S. 282, 289 (1929). Further, to whatever

extent the judiciary has the power to imply or create remedies, "it has long been the law that such power should not be exercised in the face of an express decision by Congress concerning the scope of remedies available under a particular statute." *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 732 (1989).

Here, Congress crafted a narrow appellate remedy with extremely short time-frames so as to not unduly delay the sentencing process. Therefore, adding more remedies, especially those that will substantially delay the final resolution of the sentencing process, should be avoided, because they would substantially undermine Congress' clear intent.

The foregoing point is reinforced by the fact that numerous courts have held that alleged victims do not have a right to appeal restitution orders or criminal sentences, and that their only appellate right is to file a petition for a writ of mandamus. As the Court of Appeals for the Tenth Circuit explained in *United States v. Hunter*, 548 F.3d 1308, 1313-1315 (10th Cir. 2008):

> A series of restitution cases, however, stands for the proposition that nonparties have no right to post-judgment appeals in criminal cases . . .
>
> ....
>
> Several provisions of the CVRA further support our conclusion. *The CVRA explicitly provides for a single avenue through which individuals may seek appellate review of the district court's application of the statute:*

> *mandamus. Given that the CVRA contains this express remedy, we are reluctant to read additional remedies - including the right to a direct appeal - into it . . . .*
>
> Moreover, the CVRA provides that "[i]n any appeal in a criminal case, *the Government* may assert as error the district court's denial of any crime victim's right in the proceeding to which the appeal applies." 18 U.S.C. § 3771(d)(4) (emphasis added). If Congress contemplated that 'victims' could take a direct appeal, then surely that provision would read that either the victims or the government could assert victims' rights on appeal. *Instead, the provision allowing "the Government" to assert victims' rights indicates that Congress did not expect victims to assert their own rights through post-judgment appeals.* (Emphasis added.)

See also United States v. United Sec. Sav. Bank, 394 F.3d 564, 567 (8th Cir. 2004); *United States v. Johnson*, 983 F.2d 216, 220-21 (11th Cir. 1993); *United States v. Grundhoefer*, 916 F.2d 788, 792 (2d Cir. 1990).[2]

Accordingly, this Court should not undermine Congress' decision to give alleged victims a limited

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[2] Contrary to the Funds' assertion, the fact that the CVRA requires the courts of appeals to issue written decisions does not support a conclusion that Congress intended for alleged victims to be able to petition this Court for review. Simply put, Congress required the appellate courts to issue written decisions to insure that the courts articulated the rationale for their decisions, notwithstanding the extremely short time frames Congress imposed on the mandamus process.

right of appellate review with very short time frames, by judicially creating another right of review that will substantially delay the finality of the sentencing process.

B. The Funds are not "parties" to this criminal action and, therefore, lack standing to file a petition for a writ of certiorari under 28 U.S.C. § 1254(1).

The Funds also wrongly rely on 28 U.S.C. § 1254(1) to obtain review in this Court. Section 1254(1) provides that "cases" in the courts of appeals may be reviewed by this Court "upon the petition of any party to any civil or criminal case . . . ." The mere fact that the Court of Appeals heard this case below, however, does not give the Funds "party" status needed to file a petition for a writ of certiorari.

A party to litigation is "[o]ne by or against whom a lawsuit is brought." *U.S. ex rel. Eisenstein v. City of New York, New York*, 129 S. Ct. 2230, 2234 (2009), *citing* Black's Law Dictionary 1154 (8th Ed. 2004). Clearly, the parties to this case are the United States of America and the defendant Charles Doherty.

The mere fact that the Funds were involved in a case before a court of appeals pursuant to the CVRA's mandamus review provision does not mean that they have general "party" status. The Funds argue that because they were involved in the mandamus proceedings, and because Section 1254(1) states that "any party to any civil or criminal case" may petition for a writ of certiorari, it reasonably follows that they were a party and can file this petition; however, the Funds cannot bootstrap their way into party status by

relying on the fact that the CVRA granted them the right to obtain mandamus review by the court of appeals.

Further, the Funds' reliance on *Devlin v. Scardelletti*, 536 U.S. 1 (2002), for the general proposition that this Court has not restricted party status to those named as such in the litigation, is misplaced. *Devlin* involved a civil class action lawsuit in which the Court held that a non-named member of the plaintiff class had the right to appeal the district court's approval of a settlement. Important distinctions between civil and criminal cases, however, dictate that *Devlin* should not be extended to victims who intervene in criminal cases.

As the Court of Appeals for the Tenth Circuit explained in *Hunter*, 548 F.3d at 1308:

> *Devlin*, like many of the cases that the Antrobuses cite, is a civil case . . . there is an important distinction between civil and criminal cases. Civil cases often implicate the pecuniary rights of non-parties . . . .
>
> Criminal trials, on the other hand, place an individual citizen against the United States government. While non-parties may have an interest in aspects of the case, they do not have a tangible interest in the outcome. This distinction is evidenced by our procedural rules. The Federal Rules of Civil Procedure allow non-parties to intervene to assert their rights. *See* Fed. R. Civ. P. 24. The Federal Rules of Criminal Procedure contain no comparable provision. This distinction recognizes that non-

> parties often have a unique interest in civil cases. Because non-parties do not have a comparable unique interest in the outcome of criminal trials, we do not consider *Devlin* or *Plain* persuasive in this case.

The Tenth Circuit's sound reasoning in *Hunter* should be followed here.

The Funds also wrongly argue that they are parties to a "case" because they were parties to the mandamus petition, which is a "case" under 28 U.S.C.S. § 1254, as interpreted by the Court in *Hohn v. U.S.*, 524 U.S. 236, 240 (1998). The Funds' reliance on *Hohn* is misplaced. In *Hohn,* the *defendant* filed the petition for a writ of certiorari. Therefore, because a defendant is always a "party," *Hohn* does not help the funds establish that victims also have "party" status.

Accordingly, because victims do not have "party" status, they do not have a right to petition for certiorari under Section 1254.

C. The Funds' policy arguments do not justify a departure from the clear language of the CVRA or 28 U.S.C. § 1254(1).

It is axiomatic that apart from the original jurisdiction conferred by Article III of the Constitution (which plainly does not apply here), the Court's jurisdictional authority derives from statutes enacted by Congress. *See Felker v. Turpin*, 518 U.S. 651, 661

(1996).[3] In support of their petition for a writ of certiorari, the Funds rely, almost exclusively, on public policy justifications. The appropriate forum for the Funds' arguments, however, is Congress, not this Court. Regardless of the validity or invalidity of the Funds' policy arguments, the Court's jurisdiction to hear the Funds' appeal must have a statutory basis, which is absent here. Having failed to establish any statutory basis for the Court's jurisdiction, the Funds' petition for a writ of certiorari must be denied.

Further, equally strong policy arguments support denying alleged victims the right to seek certiorari review. First, allowing appeals by alleged victims would undermine the well-established interest in the finality of judgments. *See Daniels v. U.S.*, 532 U.S. 374, 378 (2001) (discussing the judiciary's general interest in the finality of criminal judgments).

Second, allowing appeals by alleged victims would disrupt the orderly administration of justice. As the Court of Appeals for the Tenth Circuit explained in *Hunter:*

> Finally, § 3771(d)(6) states that "[n]othing in this chapter shall be construed to impair the prosecutorial discretion of the Attorney General or any officer under his direction." This

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[3] The Funds correctly state that the Court has jurisdiction to determine its own jurisdiction. Petition at 12, *citing United States v. Ruiz*, 536 U.S. 622, 628 (2002); however, it does not follow, and the Funds have not argued, that the Court's authority to *determine* its own jurisdiction carries with it a concomitant right to *create* jurisdiction over the Funds' petition for a writ of certiorari.

> provision evinces the impropriety of re-opening sentences - especially those resulting from plea agreements - once purported victims have asserted their rights in the district court and to the court of appeals in a mandamus petition . . .
>
> If individuals were allowed to re-open criminal sentences after all issues have been resolved - including any mandamus petitions by victims - then the government's prosecutorial discretion would be limited.

548 F.3d at 1316.

In sum, the CVRA gives victims a expressly limited, time-constrained remedy to seek review of a district court's adverse decision. Under these circumstances, there is no reason to upset the unambiguous statutory scheme simply to give victims one more bite at the apple, particularly where granting such a right would undermine the very reason for tightly constraining the review by the court of appeals - the strong interest in achieving finality in sentencing.

II. THERE IS NO SPLIT IN THE CIRCUITS THAT WARRANTS REVIEW BY THIS COURT.

The Court of Appeals correctly determined that on the facts of this case, the Funds are not victims entitled to restitution because they were not directly and proximately harmed by the lone conspiracy crime of conviction, but rather, were harmed, if at all, by a separate, uncharged conspiracy that involved materially different acts and elements. The Funds ground their petition for a writ of certiorari on a split in the circuits, which they characterize as being

whether restitution in conspiracy cases is limited to the harm caused by the offense of conviction, or extends more broadly to harm caused by closely "related" but uncharged conduct of the defendant; however, there is no such split. More importantly, the circuits courts unanimously agree that victim status for restitution purposes does not extend to one harmed by uncharged conduct that was not part of the conspiracy crime of conviction.[4]

A. *Hughey* and its aftermath.

In *Hughey v. United States*, 495 U.S. 411, 416 (1990), this Court held that the Victim and Witness

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[4] Doherty also submits that the Funds did not adequately preserve this issue for review. At both the district court and the court of appeals, the Funds strenuously argued that they were victims of Doherty's money laundering conspiracy because Doherty's payment of cash to U.S. Rebar's workers was the "financial transaction" that established the underlying money laundering crime. 568 F.3d at 84 - 84 (the Funds "reiterate[] arguments made below that Doherty's cash payments to his employees were the financial transactions that completed the money laundering conspiracy."). The lower courts, however, conclusively rejected the Funds' argument, finding instead that the check casher's delivery of the cash to Doherty was the "financial transaction" for purpose of the money laundering crime.

Here, the Funds do not argue that they were victims because Doherty's cash payments to U.S. Rebar's workers were the "financial transactions" for purposes of the money laundering crime. Instead, the Funds now argue that they should be considered victims simply because, in their view, there is some "relatedness" between the money laundering conspiracy crime of conviction and their loss of contributions. Doherty submits that the Funds' current argument materially differs from the argument it pressed below, and that the Funds' did not adequately preserve their current argument for review.

Protection Act ("VWPA") authorized restitution to compensate victims "only for losses caused by the conduct underlying the offense of conviction." Examining the statutory language of the VWPA, the Court determined that "Congress intended restitution to be tied to the loss caused by the offense of conviction," rather than "all conduct attributable to the defendant, including conduct unrelated to the offense of conviction." 495 U.S. at 418.

In response, Congress amended the VWPA to expand the definition of "victim" to include "a person directly and proximately harmed as a result of the commission of an offense ... including, in the case of an offense that involves as an element a scheme, conspiracy, or pattern of criminal activity, any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern." *See* 18 U.S.C. § 3663(a)(2); *United States v. Bussell,* 504 F.3d 956, 966 (9th Cir. 2007). Therefore, under the amended definition, "if someone is convicted of a conspiracy, the court can order restitution for damage resulting from any conduct that was part of the conspiracy and not just from specific conduct that met the overt act requirement of the conspiracy conviction." *Id.* Nonetheless, the amended definition of "victim" still requires one to be harmed by criminal "conduct that is both engaged in the furtherance of the scheme, conspiracy or pattern, and proscribed by the criminal statute the defendant was convicted of violating," and "does not include a person who has experienced no harm arising from the criminal conduct that gives rise to the offense of conviction." *United States v. Kones*, 77 F.3d 66, 70 - 71 (3d Cir. 1996).

Congress used an identical definition of "victim" when it enacted the MVRA. *See* 18 U.S.C. § 3663A(a)(2). Therefore, under the MVRA, *Hughey* still "requires the court to exclude injuries caused by offenses that are not part of the scheme of which [the defendant] has been convicted." *United States v. George*, 403 F.3d 470, 474 (7th Cir. 2005). *See also United States v. Dickerson*, 370 F.3d 1330, 1341 (11th Cir. 2004) ("[E]ven after the CCA and the MVRA, a criminal defendant cannot be compelled to pay restitution for conduct committed outside of the scheme, conspiracy, or pattern of criminal behavior underlying the offense of conviction."). Indeed, that is precisely why the Court of Appeals ruled that the Funds were not victims in this case.

B. There is no split in the circuits concerning the definition of "victim" under the MVRA in conspiracy cases.

The Funds describe the so-called split among the circuit courts as being between the courts that extend victim status to those harmed by "closely related, uncharged conduct," and the courts that limit victim status to those harmed by conduct that is one of the elements of the offense of conviction. While some courts have characterized victim status more broadly than others, no court has held (or even suggested) that victim status extends to persons, such as the Funds, who were harmed by criminal conduct that was separate and distinct from the crime of conviction. Accordingly, there is no split among the circuits on the facts presented by this case.

Several circuits have held that in conspiracy cases, victims can include persons who were directly and

proximately harmed by the criminal conspiracy of which the defendant was convicted, even if (1) the victims were not named in the information or plea agreement, or (2) the operative events occurred outside of the statute of limitations. *See. e.g., United States v. Brock-Davis*, 504 F.3d 991, 999-1000 (9th Cir. 2007); *United States v. Holthaus*, 486 F.3d 451 (8th Cir. 2007); *United States v. Dickerson*, 370 F.3d at 1342; *United States v. Hensely*, 91 F.3d 274, 277 (1st Cir. 1996); *United States v. Henoud*, 81 F.3d 484 (4th Cir. 1996). Significantly, however, this case presents vastly different facts because the lower courts determined that the Funds were not harmed by the conspiracy crime of conviction, which was completed when Doherty received the cash from the check casher, but instead, were harmed by a separate and distinct uncharged conspiracy that involved materially different acts and elements.

Indeed, the Court of Appeals expressly raised and dismissed the very argument the Funds now assert regarding a possible split in the circuits regarding those harmed *by a separate criminal scheme that was outside the counts of conviction*. The Court of Appeals reasoned in this regard as follows:

> A decision of the Ninth Circuit could be interpreted to contradict our position, as it states that the amendment to the VWPA overrules the holding in *Hughey* and allows restitution to be granted to those "harmed in the course of the defendant's scheme even beyond the counts of conviction." *United States v. Brock-Davis*, 504 F.3d 991, 999-1000 (9th Cir. 2007) (emphasis in original) (quoting *United States v. Rutgard*, 116 F.3d 1270, 1294 (9th Cir.

> 1997)). In reaching that conclusion, the Ninth Circuit determined that conduct not specifically mentioned in an indictment charging a conspiracy to manufacture methamphetamine on a specific date and at a specific location, was, in fact, "related conduct" for which restitution could be granted. *Id.* at 999. The Ninth Circuit ordered restitution for damages to a motel caused by the conspirators' manufacturing of methamphetamine that occurred on a different date and in a different city than that alleged in the indictment. *Id. The case, however, can be read to correspond with the instant decision because the Ninth Circuit, in effect, found that the conduct for which restitution was granted, which was identical to the charged conduct, was a part of the "pattern of criminal activity" that formed the basis of the conspiracy to manufacture methamphetamine. A comparable situation in the case before us would arise if the indictment had specified specific forged checks and a victim suffering a loss as a result of a non-identified forged check that had also been laundered had moved for restitution. That is not this case, however, as Local 46 is asserting different victim status based on Doherty's acts of payment to his employees, acts that are different from, and outside of, the charged activities.* (Emphasis added.)

568 F.3d at 87, n. 3

Moreover, the Funds mischaracterize the decisions they rely upon in their zeal to identify a split among the circuit courts. For example, the Funds cite the Eighth Circuit's decision in *Holthaus* for an expansive

definition of "victim" under the MVRA; however, the Funds rely on *dicta* in that case that falls well short of establishing a spit in the circuits.

In *Holthaus*, the Court of Appeals for the Eighth Circuit affirmed an award of restitution in favor of a bankruptcy trustee who the district court had found was directly and proximately harmed by the offense to which the defendant had pleaded guilty – the filing of a false declaration in connection with an individual's bankruptcy petition. In *dicta* in a footnote, the *Holthaus* Court acknowledged that the victim of a conspiracy or scheme crime need not be specifically named in the indictment or guilt plea to recover restitution. Thus, *Holthaus* stands for the unremarkable proposition that one harmed by the scheme or conspiracy of conviction can be a victim entitled to restitution, even if that person was not named in the indictment or guilty plea. Significantly, however, *Holthaus* does not depart from the well-settled rule that to be a victim, one must be directly and proximately harmed by the conspiracy of conviction.

Indeed, this point is evidenced by the fact that *Holthaus* did not address, or purport to change, the Eighth Circuit's earlier decision in *United States v. Ramirez*, 196 F.3d 895, 900 (8th Cir. 1999), which held that the scope of the scheme or conspiracy of conviction defines the outer limits of permissible restitution. In *Ramirez*, the court stated in pertinent part as follows:

> Under the statute as amended, the district court had discretion to order restitution for all the victims of Ramierz's scheme to defraud, whether or not their transactions were

specifically named in the indictment. However, we still need to determine the contours of that scheme. In explaining a later amendment that made restitution mandatory for certain offenses, the Senate Judiciary Committee stated:

> The committee intends this provision to mean, except where a conviction is obtained by a plea bargain, that mandatory restitution provisions apply only in those instances where a named, identifiable victim suffers a physical or pecuniary loss *directly and proximately caused by the course of conduct under the count or counts for which the offender is convicted.*

[Citation omitted.] Consistent with both the plain language of the statue and this indication of legislative intent, we "look to the scope of the indictment" to determine whether an award is "within the outer limits of a permissible restitution order." ....

In this case, the indictment was limited to the Wilmar Project fraud and did not state, or even imply, that this fraud was part of a broader, ongoing scheme of any kind, much less one dating back to the mid-1970s. *Ramirez was not charged with nor convicted of defrauding investors in other projects and the fact that the government has allowed other investors to file claims against his forfeited assets in no way expands the universe of persons who may be awarded restitution under 18 U.S.C. § 3663(a). We conclude that restitution in this case must be*

limited to those victims who lost money investing in the Wilmar Project. (Emphasis added.)

196 F.3d at 899 -900.

The Funds also mistakenly rely on the First Circuit's decision in *Hensely*. The Funds cite *Hensely* for the proposition that restitution is available to a victim, even if the criminal conduct that harmed the victim was not alleged in a count to which the defendant pleaded guilty, or was not even charged in an indictment. When the court's statements are viewed in context, however, it is apparent that the court's decision is consistent with the Second Circuit's ruling in this case.

In *Hensely*, the defendant pleaded guilty to an indictment alleging that he devised and executed a scheme in Boston to obtain merchandise by false pretenses from specific computer-products distributors during a specified period of time. After the defendant's guilty plea and before sentencing, the government learned that the defendant had committed additional, virtually identical additional fraudulent acts during the same time period. The court permitted a victim of the subsequently-discovered fraud to recover restitution because, in the court's view, the victim was directly and proximately harmed by the very scheme for which the defendant was convicted. Significantly, however, the court denied restitution to persons harmed by the defendant's other criminal acts - use of counterfeit money to pay certain bills - "because they were not part of the scheme underlying the offense of conviction." 91 F.3d at 278, n. 3. Thus, *Hensley* supports only the unremarkable proposition that subsequently identified victims who were harmed by

the scheme of conviction can recover restitution even though they were not named in the indictment.

The Funds also mistakenly rely on the Fourth Circuit's decision in *Henoud*. In *Henoud*, the defendant was convicted of an overseas call-selling scheme and was ordered to pay restitution to the local and long-distance telephone companies he defrauded during the course of his conspiracy. The defendant challenged the district court's order of restitution, contending that it improperly required him to pay certain companies not specifically named in the indictment.

In affirming the trial court's order, the court of appeals held that restitution was proper, notwithstanding the fact that certain victims were not named in the indictment, because they were directly harmed by the acts of fraud that comprised the scheme for which the defendant was convicted. As the court explained:

> The acts comprising the scheme to defraud therefore constitute the conduct underlying the offense of conviction and establish "the outer limits of [the] restitution order." [Citation omitted.] And the district court's inclusion of any loss to any victim caused by the scheme to defraud would satisfy *Hugley's* requirement of focusing only upon the specific conduct underlying the offense of conviction." Because the indictment alleges with specificity a scheme to defraud local and long-distance carriers, "[t]he district court had the authority to order restitution for the losses by the entire fraud scheme, not merely for the losses caused by the

> specified acts of fraud proved by the government at trial." [Citation omitted.]
>
> ... *As long distance carriers, Metro Media and Allnet were directly harmed by Henoud's criminal activity and thus properly included in the restitution order as victims of the offenses. Henoud places too much emphasis on the fact that these long-distance carriers are not specifically named in the indictment. The indictment's description of Henoud's criminal scheme and intended targets is sufficiently broad to include the smaller carriers also injured.* (Emphasis added.)

81 F.3d at 489. Consequently, *Henoud* is consistent with the Second Circuit's decision in this case, in that it requires a victim to have been directly and proximately harmed by the conspiracy of conviction.

The Funds also mistakenly rely on the Eleventh Circuit's decision in *Dickerson*. In *Dickerson*, the court held that "where a defendant is convicted of a crime of which a scheme is an element, the district court must, under 18 U.S.C. § 3663A, order the defendant to pay restitution to all victims for the losses they suffered from the defendant's conduct in the course of the scheme, even where such losses were caused by conduct outside the statute of limitations." 370 F.3d at 1342. Therefore, contrary to the Funds' argument, *Dickerson* does not support the proposition that those harmed by a separate, uncharged scheme, are entitled to restitution.

Finally, the Funds mistakenly rely on the Ninth Circuit's decision in *Brock-Davis, supra*. As explained

above, the Second Circuit correctly determined that *Brock-Davis* was consistent with its decision in this case. 568 F.3d at 87, n. 3.

In short, far from there being a block of circuit courts that squarely advocate an expansive interpretation of the definition of "victim" in conspiracy cases that could possibly encompass the Funds, the circuit courts unanimously hold that to be a victim, one must be directly and proximately harmed by the conspiracy or scheme of conviction. Thus, because the Funds were harmed, if at all, by uncharged crimes that were separate and distinct from the money laundering conspiracy crime of conviction, the Court of Appeals for the Second Circuit correctly held that the Funds are not victims entitled to restitution, and there is no split among the circuits on this point.

C. The Funds seek to unreasonably expand the definition of the term "victim."

In essence, the Funds argue that the term "victim" should include anyone harmed by uncharged criminal conduct so long as the conduct was temporally related to the conspiracy crime of conviction. Petition at 17 - 18. Citing Section 3663A(a)(2) of the MVRA, which provides that to be a victim, one must be "directly and proximately harmed as a result of the commission of an offense ... including, in the case of an offense that involves as an element a scheme, conspiracy, or pattern of criminal activity, any person directly harmed by the defendants' criminal conduct in the course of the scheme, conspiracy, or pattern," the Funds reason that Congress intended to include acts

beyond the scheme or conspiracy of conviction. The Funds are mistaken.

First, as the Second Circuit recognized in this case, the Funds' interpretation renders the "directly and proximately harmed as a result of the commission of an offense" language superfluous. 568 F.3d at 87.

Second, as explained above, several courts have recognized that the "in the course of the scheme, conspiracy, or pattern" language reasonably can be interpreted as expanding the scope of victims to include those harmed by the scheme or conspiracy of conviction, even if they were not named in the indictment or plea agreement, or their harm occurred outside of the statute of limitations; however, each of those courts also recognized that the language cannot reasonably be used to provide restitution to those who were directly and proximately harmed by a different, uncharged scheme or conspiracy, even if the harm occurred at or near the same time.

Third, this is not an appropriate case in which to consider expanding the definition of the term "victim" in the MVRA. The lower courts in this case unanimously found that the crime of conviction (conspiracy to commit money laundering) was completed when Doherty received the cash from the check casher for the fraudulent checks Doherty issued, and the Funds were harmed, if at all, by a separate, uncharged conspiracy involving materially different acts and elements - Doherty's use of the cash he received from the check casher to pay employees off the books, and Doherty's corresponding fraudulent failure to have U.S. Rebar report the hours or pay contributions to the Funds for hours worked by those

employees. Because no court has held or even suggested that victim status should be extended to encompass persons harmed by crimes that were not part of the conspiracy crime of conviction, and involved materially different acts and elements, the Court should not to use this case to consider the issue.

Fourth, it is noteworthy that multiemployer trust funds already have strong civil remedies through which they can recover delinquent contributions. Congress enacted Section 515 of the Employee Retirement Income Security Act, 29 U.S.C. § 1145, for the very purpose of easing a fund's ability to recover delinquent contributions. Moreover, trust funds also can recover delinquent contributions from individuals who constitute alter egos of a delinquent employer. *See, e.g. Trustees of the Nat'l Elevator Indus' Pension Health Benefit and Educ' Funds v. Lutyk*, 332 F.3d 188 (3d Cir. 2003). Accordingly, there is no need to expand the definition of the term "victim" to protect multiemployer trust funds.

In sum, there is no split in the circuits regarding the meaning of the term "victim" in the MVRA and the lower courts unanimously agree that victim status does not encompass one harmed by a defendant's criminal conduct that was separate and distinct from the crime of conviction.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully Submitted,

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